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Chapter 752: Making Grocers Pay the Price for Overcharging Customers

Joel A. Eisenberg

Code Section Affected

Business and Professions Code § 12024.2 (amended).

AB 1721 (Koretz); 2004 Stat. ch. 752.

I. INTRODUCTION

Imagine going to the grocery store and seeing your favorite brand of cookies on sale for two dollars and fifty cents. At the checkout line, while you are getting your wallet out and the checker is scanning your groceries, you fail to notice that the scanner rings up your cookies for three dollars. The sale price expired the day before your shopping trip, and the tag was still on the shelf. For this trip to the store, the mislabeled price cost you fifty cents—pocket change. Now imagine you are the collective consumers of Riverside County, where state and county officials estimate the grocery-scanner error rate to be four percent.¹ Errors such as the fifty cent overcharge for your favorite cookies cost the consumers of Riverside County an estimated \$8.5 million every year.²

This situation is exactly what the California Legislature addressed when it passed Chapter 752, amending Business and Professions Code section 12024.2.

II. EXISTING LAW

A. Existing California Law for Overcharging Consumers

California law already prohibits stores from selling products for prices higher than they advertise.³ If a store charges a price less than one dollar over the price advertised or posted, the violation is an infraction punishable by a fine up to one hundred dollars.⁴ If, however, the difference is more than one dollar, the violation is a misdemeanor punishable by a fine up to one thousand dollars or a year in the county jail.⁵ The same penalty applies whether the violation is willful or grossly

1. Lou Hirsh, *Scanner Inspection Approved*, THE DESERT SUN (Palm Springs, Cal.), June 9, 2004, at 1E. A recent investigation by the Santa Barbara County Department of Weights and Measures revealed a scanner error rate of 8.84%. Santa Barbara County District Attorney, *Consumer Protection Cases*, at <http://www.countyofsb.org/da/CivilDivision/ConsumerProtection/ConsCases.asp> (last visited Sept. 5, 2004) (on file with the *McGeorge Law Review*).

2. Hirsh, *supra* note 1, at 1E.

3. See generally CAL. BUS. & PROF. CODE § 12024.2 (West Supp. 2004) (describing the penalties for computation of an untrue value at the time of sale).

4. *Id.* § 12024.2(a)-(b). Although Chapter 752 changes some of the language of the prior statute, the penalties for its violation remain the same. *Id.*

5. *Id.* § 12024.2(a).

negligent.⁶ The code's provisions were added in 1977, predating the use of electronic price scanners.⁷

Stores have met with success when attempting to get around the code's provisions. Some courts have construed the language of the prior version of section 12024.2 to exclude circumstances where stores put expiration dates on the price of their sale products.⁸ If the price on the tag has expired, the consumer is out of luck, even if the price is still on the shelf or on the product itself.

B. California Law and Automatic Checkout Systems

The California Legislature has passed a number of laws forcing merchants to be responsible for their automatic checkout systems. Civil Code section 7100 requires grocery stores that use automatic checkout systems⁹ to have clearly readable prices on eighty-five percent of the packaged consumer commodities they offer for sale.¹⁰ Intentional violation of this provision is punishable by a civil penalty between twenty-five and five hundred dollars.¹¹ Unintentional error, however, is not a violation of the provision.¹² The section also excludes sale or special items.¹³

In 2002, the California Legislature passed Business and Professions Code section 13300.¹⁴ The law requires businesses that use automatic checkout systems to conspicuously display to consumers the price of each good or service at the

6. *Id.*

7. *Id.*; see also SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 4 (June 21, 2004) (stating that proponents of the law argue that the language of the prior version of § 12024.2 predates the use of electronic price scanners).

8. See OFFICE OF ASSEMBLYMAN PAUL KORETZ, AB 1721 FACT SHEET, at 1 [hereinafter FACT SHEET] (on file with the *McGeorge Law Review*) ("Recently, two trial courts have found that a grocery retailer did not violate the current scanner overcharge law when it posted two prices for an item. One had an expiration date that had passed in small print. With this recent court decision, it is anticipated that retailers statewide will be encouraged to place expiration dates on all signage in order to avoid prosecution . . ."); SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 4 (June 21, 2004) (stating that "courts [have taken] the view that under current law it is permissible to charge more than the lowest advertised price, so long as the retailer places an expiration date on its sales tags that may still be on the shelf after the expiration date has passed"); see, e.g., *People v. VONS* #2456, No. 2002023521 (Cal. Super. Ct., Ventura County Mar. 17, 2003) (acquitting VONS on eight counts of violating California Business and Professions Code § 12024.2).

9. See CAL. CIV. CODE § 7100(c)(1) (West 1997) (defining "automatic checkout system" as "a computer capable of interpreting the universal product code or any other code which is on an item offered for sale to determine the price of items being purchased, regardless of whether the code entry is accomplished manually by a human or automatically by a machine").

10. *Id.* § 7100(a).

11. *Id.* § 7101(a); see also *id.* § 7101(b) (creating a presumption of intent to violate section 7100 when a grocery store "[fails] to have a clearly readable price indicated on 12 units of the same item required to be item-priced of the same commodity").

12. *Id.* § 7103.

13. *Id.* § 7100(b)(3).

14. CAL. BUS. & PROF. CODE § 13300 (West Supp. 2004).

time of checkout.¹⁵ The display must include “[a]ll price reductions, surcharges, taxes, and the total amount for each transaction.”¹⁶ Businesses must comply with the law by January 1, 2007.¹⁷

III. CHAPTER 752

First, and most importantly, Chapter 752 makes it unlawful for a merchant at the time of sale to sell a commodity for more than the lowest price posted on the product itself or on a shelf tag.¹⁸ Selling the product for more than the lowest posted price is a crime even if the price has an expiration date that has already passed.¹⁹ However, there is a limitation on these new provisions. Pricing may be subject to a condition, such as membership in a club, minimum quantities to be purchased, or multiple quantities to be purchased.²⁰ These conditions must be conspicuously posted at the same location as the purchase price.²¹

Second, Chapter 752 changes some of the key language of section 12024.2. The previous version of the code made it unlawful to “compute . . . a value which is not a true extension of a price per unit” or to “charge . . . a value which is more than the price . . . then advertised.”²² Now, the section makes it a crime to “compute *an amount greater* than a true extension of a price per unit” or to “charge *an amount greater* than the price . . . then advertised.”²³ Chapter 752 also clarifies language in another section by replacing a verbose phrase with a single word. It replaces the phrase, “the difference between the value actually computed and the total true value of the commodity offered for sale,”²⁴ with “overcharge.”²⁵

Third, Chapter 752 modifies the definition of a crime under section 12024.2. It adds a provision that a sale above the lowest posted price is unlawful “notwithstanding any limitation of the time period for which the posted price is in effect.”²⁶

15. *Id.* § 13300(a).

16. *Id.*

17. *Id.* § 13300(c).

18. CAL. BUS. & PROF. CODE § 12024.2(a)(2) (amended by Chapter 752); *id.* § 12024.2(e).

19. *See id.* § 12024.2(a)(2) (stating that it is unlawful to charge an amount greater than the lowest posted price “notwithstanding any limitation of the time period for which the posted price is in effect”).

20. *Id.* § 12024.2(f).

21. *Id.*

22. CAL. BUS. & PROF. CODE § 12024.2(a) (West Supp. 2004).

23. CAL. BUS. & PROF. CODE § 12024.2(a)(1) (amended by Chapter 752) (emphasis added).

24. CAL. BUS. & PROF. CODE § 12024.2(a) (West Supp. 2004).

25. CAL. BUS. & PROF. CODE § 12024.2(b)-(c) (amended by Chapter 752); *see also id.* § 12024.2(d) (defining “overcharge” as “the amount by which the charge for a commodity exceeds a price that is advertised, posted, marked, displayed, or quoted to that consumer for that commodity at the time of sale”).

26. *Id.* § 12024.2(a)(2). Because of this change, the state is not required to reimburse local agencies who incur costs as a result of the enacted statute. 2004 Cal. Stat. ch. 752, § 4.

IV. ANALYSIS

A. Reasons for Chapter 752

The California Legislature provided a simple reason for enacting Chapter 752. It claimed that the number of sale items at supermarkets have increased dramatically over the years.²⁷ The discounted prices often stay on shelves after the sale is over.²⁸ Customers then think the product costs one price, but the store's scanner rings up another price.²⁹ They usually do not notice the difference because store checkout systems scan products so quickly.³⁰ Chapter 752 is the Legislature's response to this problem.³¹

Proponents of the bill argue that the language of section 12024.2 was sorely outdated.³² Under the prior version of the statute, nothing prohibited a store from placing an expiration date on a shelf tag and then leaving the price on the shelf after the expiration date had passed.³³ Some courts interpreted the statute accordingly, presumably because nothing in the statute prohibited such action.³⁴

27. SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 2 (June 21, 2004).

28. *Id.*

29. *See id.* at 3 ("Sales price tags are often left on the shelves after the expiration of the sale, and do not accurately reflect the price that will be charged, sometimes with a different price listed on a label on the actual product."); *see also* Letter from Cato R. Fiksdal, County of Los Angeles Agricultural Commissioner/Director of Weights and Measures, to Liz Figueroa, Chair, Senate Business and Professions Committee (June 15, 2004), at 2 [hereinafter Fiksdal Letter] (on file with the *McGeorge Law Review*) ("Expired tags should not be viewed in the context of just one stand alone sales tag. Expired tags should be viewed in their environment where the store may have hundreds of tags, all formatted identically, with varying expiration dates. To expect each customer to search for and then understand the expiration date is unreasonable.").

30. *See* SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 3 (June 21, 2004) (stating that "because of the volume of items and the speed with which their prices are scanned by store scanners—consumers are often unaware that the scanned price they are charged is higher than the sale price on the commodity's shelf tag").

31. *See* FACT SHEET, *supra* note 8, at 1 (claiming, in part, that Chapter 752 is meant to curb "deception and the misleading of consumers").

32. *See* Letter from Gregory D. Totten, District Attorney, County of Ventura, to Liz Figueroa, California State Senate (Feb. 24, 2004), at 1 (on file with the *McGeorge Law Review*) (stating, "[w]hen section 12024.2 was originally enacted, automated retail checkout systems did not exist. The law needs to be updated to match current pricing practices.").

33. *See* SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 4 (June 21, 2004) (claiming that the prior version of § 12024.2 did "not make it clear that charging more than the advertised or posted sale price is unlawful notwithstanding the existence of the posting of an expiration date on sale price tags").

34. *See* FACT SHEET, *supra* note 8, at 1 ("Recently, two trial courts have found that a grocery retailer did not violate the current scanner overcharge law when it posted two prices for an item. One had an expiration date that had passed in small print. With this recent court decision, it is anticipated that retailers statewide will be encouraged to place expiration dates on all signage in order to avoid prosecution . . ."); SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 4 (June 21, 2004) (stating that "courts [have taken] the view that under current law it is permissible to charge more than the lowest advertised price, so long as the retailer places an expiration date on its sales tags that may still be on the shelf after the expiration date has passed"); *see, e.g.,* *People v. VONS #2456*, No. 2002023521 (Cal. Super. Ct., Ventura County Mar. 17, 2003) (acquitting Vons on eight counts of violating California Business and Professions Code § 12024.2).

Now the statute is explicit. Grocers cannot sell products for more than the lowest price posted, “notwithstanding any limitation of the time period for which the posted price is in effect.”³⁵

B. Responding to Criticism?

Two organizations originally opposed Chapter 752: the California Grocers Association and the California Independent Grocers and Convenience Stores.³⁶ They made two arguments. First, they argued that the ordinary consumer is familiar with expiration dates;³⁷ this consumer checks for expiration dates on coupons, sale signs, and perishable goods.³⁸ Second, they argued that grocers already have an industry practice of removing discounted prices from shelves at the end of sales.³⁹ Sometimes, due to human error, those prices stay on the shelves.⁴⁰ When a customer notices he or she has paid more than the shelf price, the industry typically uses “internal price accuracy policies” to refund extra money paid or to provide the consumer with the product for free.⁴¹

The Legislature responded to the first argument by declaring that even ordinary consumers get confused by “the inherently misleading nature of expired or premature sale price tags, their large number, small size, and multiple locations.”⁴² It did not explicitly respond to the second argument, human error, in either the amended statute or within its Legislative findings and declarations. However, its original purpose for amending section 12024.2 was to protect consumers from misleading or confusing prices.⁴³ This is consistent with recent developments to protect consumers from other inaccuracies at the checkout line. Grocers with automatic checkout systems must have clearly readable prices on eighty-five percent of the products they sell.⁴⁴ Soon, they will be required to have conspicuous displays at checkout that indicate all prices, taxes, and surcharges that customers incur.⁴⁵ The Legislature passed the latter statute intending for “the state laws that protect consumers [to] be adequately enforced to ensure fair

35. CAL. BUS. & PROF. CODE § 12024.2(a)(2) (amended by Chapter 752).

36. SENATE BUSINESS AND PROFESSIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 1721, at 4-5 (June 21, 2004).

37. *See id.* at 5 (citing opponents’ argument that “the use of expiration dates on time sensitive sales is a common practice in their industry and that consumers understand expiration dates”).

38. *See id.* (citing opponents’ argument that “consumers understand expiration dates whether they are applied to coupons, sales signs or perishable products such as milk and meat”).

39. *See id.* (citing opponents’ argument that “[t]heir current practice is to post a sale sign with an expiration date marked on the shelf tag, which are removed at the end of the sale”).

40. *See id.* (citing opponents’ argument that “occasionally, as a result of human error, a sale sign is accidentally overlooked, and remains posted past the expiration date”).

41. *Id.*

42. *Id.* at 3.

43. *See generally id.* (describing the reasons for Chapter 752 and its changes to § 12024.2).

44. CAL. CIV. CODE § 7100(a) (West 1997).

45. CAL. BUS. & PROF. CODE § 13300 (West Supp. 2004).

business practices.”⁴⁶ These improvements in consumer protection indicate that the Legislature intended to ensure that consumers never overpay, regardless of any human error on the part of the grocer.

On the other hand, the Legislature is surely adept at drafting provisions that allow for human-error exceptions to statutes. It did so for Civil Code section 7100, the provision requiring clearly readable prices on eighty-five percent of products for sale.⁴⁷ If it had intended for the amended version of section 12024.2 to exclude unintentional error for overcharges less than one dollar, it could have drafted Chapter 752 accordingly.⁴⁸ Instead, it provided the higher of two penalties for willful and grossly negligent violations or overcharges in excess of one dollar.⁴⁹ It applied the lesser penalty to overcharges less than one dollar, without referring to the requisite intent of the grocer.⁵⁰ Consequently, the Legislature may have left that provision vulnerable to challenges based on unintentional human error.⁵¹

C. Language Change

Practitioners already familiar with the prior version of section 12024.2 might stumble over the new language of its provisions. That new language, however, does little to change its effect, other than the additional clause pertaining to expiration dates.⁵² The updated version does nothing more than replace “a value which is more”⁵³ with the synonym “an amount greater.”⁵⁴ Similarly, Chapter 752 cleaned up some other language in the old version of section 12024.2. It replaced the phrase, “the difference between the value actually computed and the total true value of the commodity offered for sale,”⁵⁵ with “overcharge.”⁵⁶ This change results in nothing more than a statute that is easier to read.

46. 2002 Cal. Stat. ch. 818, § 1.

47. See CAL. CIV. CODE § 7103 (West 1997) (“Improper pricing on the shelf or on the item due to unintentional error shall not constitute a violation of this division.”).

48. See generally CAL. BUS. & PROF. CODE § 12024.2(d) (amended by Chapter 752) (omitting any discussion of unintentional error).

49. *Id.* § 12024.2(b)).

50. *Id.* § 12024.2(c).

51. One proponent of Chapter 752 made the following observation: “All error is human, but when that error results in the consumer being over charged, the store must accept the responsibility.” Fiksdal Letter, *supra* note 29, at 2.

52. CAL. BUS. & PROF. CODE § 12024.2(a)(2) (amended by Chapter 752) (providing that an overcharge is unlawful “notwithstanding any limitation of the time period for which the posted price is in effect”).

53. CAL. BUS. & PROF. CODE § 12024.2(a) (West Supp. 2004).

54. CAL. BUS. & PROF. CODE § 12024.2(a)(1) (amended by Chapter 752).

55. CAL. BUS. & PROF. CODE § 12024.2(a) (West Supp. 2004).

56. CAL. BUS. & PROF. CODE § 12024.2(b)-(c) (amended by Chapter 752); see also *id.* § 12024.2(d) (defining “overcharge” as “the amount by which the charge for a commodity exceeds a price that is advertised, posted, marked, displayed, or quoted to that consumer for that commodity at the time of sale”).

V. CONCLUSION

Chapter 752 effectively eliminates expiration dates on sale prices at grocery stores. Now, under the amended version of Business and Professions Code section 12024.2, grocers cannot charge more than the lowest price posted on a shelf or on a product itself. Even a passed expiration date on a sale price cannot prevent grocers from selling a product at that price. A violation of the section is either a misdemeanor or an infraction, both punishable by penalties.⁵⁷ However, whether or not the amended statute provides yet another loophole is a different matter. Human error may exculpate grocers who overcharge by less than one dollar.⁵⁸

Be sure to check your receipts. If the price you paid for your cookies does not match the price on the shelf, your grocer might have committed a crime under the new provisions of Chapter 752.

57. *Id.* § 12024.2(b)-(c).

58. *Supra* Part IV.B.